BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KYLE KAWAMOTO, Claimant, INTERMOUNTAIN BUILDING PANELS LLC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 04-522969** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed November 10, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted an emergency hearing in Twin Falls, Idaho, on June 3, 2005. Claimant, Kyle Kawamoto, was present in person and represented by James C. Arnold of Idaho Falls. Defendant Employer, Intermountain Building Panels, LLC., and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Scott Harmon of Boise. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs and came under advisement on September 6, 2005. Referee Barclay retired from the Idaho Industrial Commission and the matter was reassigned to Referee Alan Taylor.

ISSUE

The issue to be resolved is whether Claimant is entitled to temporary partial and/or temporary total disability benefits, and the extent thereof.

ARGUMENTS OF THE PARTIES

Claimant argues that Employer did not provide a reasonable offer of light duty employment which was likely to continue throughout his period of recovery as required by Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986), and unreasonably terminated Claimant's employment and his temporary disability benefits. He seeks an order directing Defendants to pay temporary disability benefits from his termination on December 3, 2004, until he completes his period of recovery or finds compatible full-time work.

Defendants counter that Claimant refused or neglected to perform suitable light duty work that Employer offered, that Employer reasonably fired Claimant for leaving work two hours early on December 3, 2004, and that Claimant thus forfeited his entitlement to further temporary disability benefits pursuant to Idaho Code § 72-403.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, and Employer representatives Penni Coon and Kirby Gough taken at the June 3, 2005, hearing; and

2. Joint Exhibits A through I admitted at the hearing.

After having fully considered all of the above evidence, and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Employer hired Claimant in June 2004 to help fabricate wall, roof, and floor panels for use in residential construction. At the time of hiring, Claimant was nearing the end of a period of incarceration for controlled substance violations and was hired through the Community Work Center. He worked approximately 40 to 50 hours weekly at Employer's shop in Jerome.

2. On October 14, 2004, Claimant sustained a left Achilles tendon rupture when he fell while working for Employer. Claimant was treated by James Retmier, M.D., and underwent open surgical repair of the rupture. On November 15, 2004, Mark Wright, M.D., recasted Claimant's ankle and released him for sedentary work; strictly non-weight bearing. Claimant remained ambulatory, but non-weight bearing, until Dr. Retmier placed him in a walking boot on December 15, 2004, restricting him to toe touch weight bearing and sedentary work only, with no lifting whatsoever. Dr. Retmier later cautioned Claimant that full recovery from an Achilles tendon rupture and surgical repair commonly takes approximately six months.

3. Claimant worked 10 hours for Employer on November 12, 2004. The record does not contain any work release prior to November 15, 2004, although the parties suspect such a release exists. On or about November 15, 2004, Claimant contacted his supervisor, Kirby Gough, informed him that Claimant had a doctor's release for sedentary work, and requested "light duty" work. Gough assigned Claimant to light duty work which included cleaning a new press, cleaning tools, operating the hyster, dumping garbage, cleaning the supervisor's office, banding panels, cleaning a bead extruder, helping the quality controller, and inventorying panel screws. Shortly after November 15, 2004, Claimant formally completed his period of incarceration and thereafter also

began driving Employer's truck and delivering completed panels to various work sites outside of Jerome.

4. Following his release to work by Dr. Wright, Claimant worked November 15 for 6 hours and November 16 for 9 hours. Employer accommodated Claimant's requests for several days off from work to allow him to tend to personal affairs arising from the completion of his term of incarceration and to search for an apartment. Thus Claimant was off work Wednesday, November 17 through Sunday November 21. Claimant worked November 22 for 2 hours, November 23 for 9.5 hours, and November 24 for 1 hour. During this time Claimant commuted from his apartment in Burley to the Employer's shop in Jerome. From Thursday, November 25 (Thanksgiving Day) through Sunday, November 28, 2004, Employer's plant was closed and Claimant did not work.

5. Claimant testified that the light duty work was limited, inadequate to keep him busy, and that he told his supervisor Kirby Gough: "you can give me 10, 12 hours, 15 hours. Whatever you can give me, give me, because I know the workman's [sic] comp will take care of the rest." Transcript p. 25, ls. 19-22.

6. The available light duty work was so slow that Claimant and Gough reached an agreement:

> "I said can we just set up an agreement to where if you need me you call me because I'm standing around here. I'm doing a whole lot of nothing. What I can do is light. It's limited. It's very frustrating because I know that there is [sic] other things that should be done but I can't do it [sic]. It's frustrating for me to stand around here. It's frustrating for you.

Transcript p. 26, ls. 4-11.

> That day [November 29, 2004] was the day that I talked to Kirby about kind of like a PRN worker. If you need me, call me because I stood around the day, the week before I know I stood around quite a bit and IB Panels had been good to me, you know. I didn't want to stand around. I did do work during the day. During a six or seven, eight hour day, I probably worked half a day. I mean, you add in an hour lunch time, and add in breaks here and breaks there, just waiting to help out, you know, I didn't do too much work. There wasn't that much available for me. What was available, I couldn't do on certain areas.

> I mean there was a lot, like I said, there was a lot that could be done but I couldn't help. I couldn't do those kind of things. I would stand on my feet for a little while and then I would have to sit down just because, you know, just by standing it was causing me pain.

Transcript p. 28, l. 15 through p. 29, l. 6. At hearing, Gough confirmed this on-call arrangement.

7. The Referee finds that on November 29, 2004, Claimant and his supervisor Gough, concluded that given Claimant's work restrictions Employer did not have sufficient suitable work available to occupy Claimant full-time, and that Gough would telephone Claimant when light duty work was available, particularly deliveries, and Claimant should then report for work. Although Defendants have subsequently criticized Claimant's willingness to accept less than full-time work hours because Claimant understood the workers' compensation carrier would pick up a portion of the difference, Employer was aware of Claimant's perspective and willfully participated in this arrangement.

8. Employer did not call Claimant, and Claimant did not work from Tuesday, November 30 through Thursday, December 2, 2004.

9. Consistent with their agreement, on Thursday evening, December 2, 2004, Gough called Claimant at his home and directed him to report for work the next morning to deliver a load of panels. Claimant reported at Employer's shop the following morning, December 3, 2004, shortly before 7:00 a.m. as directed. Claimant then drove Employer's truck and delivered a load of panels to the Hailey area. Claimant returned to Employer's shop between approximately noon and 1:00 p.m. Upon Claimant's return, Gough instructed him to do some cleaning around the office and sort panel screws. Gough expressly stated that he had signed Claimant's time card for 4:00 p.m. and that Claimant should "stay busy" until 4:00 and then go home. Gough then left the shop for the day.

10. Claimant checked the panel screws, all of which he had previously sorted and inventoried;

swept, organized, and washed the windows in the supervisor's office; and performed a few other things until approximately 2:00 p.m. Claimant testified that by 2:00 p.m. he had finished all the available light duty work. Claimant had been advised on a prior occasion that he needed to inform the office where he was going, so Claimant then advised Employer's receptionist, Penni Coon, that he had completed his work and was going to leave the shop for the day and go apartment hunting. Claimant asked Coon to change the departure time that Gough had entered on Claimant's time card to reflect Claimant's departure at 2:00 rather than 4:00 p.m. Coon testified that she advised Claimant that she did not have authority over the payroll, nevertheless Coon made note of the change on Claimant's time card as requested. Claimant then left the shop. Claimant had Gough's cell phone number but did not call him prior to leaving.

11. Gough returned to the shop at approximately 2:30 p.m. that same day and upon discovering that Claimant had left the shop prior to 4:00 p.m., telephoned Claimant on his cell phone and terminated his employment. It is not clear whether at the time of termination, Gough understood that Claimant had expressly requested that his time card be changed to accurately reflect his departure at 2:00 rather than 4:00 p.m.

12. Gough testified he had no problems with Claimant or his work prior to this incident on December 3, 2004.

13. Employer has not offered Claimant any employment since December 3, 2004, and Surety has denied Claimant temporary disability benefits from that day forward.

14. After December 3, 2004, Claimant was able to obtain various light duty positions for brief periods with several employers including: Horizon Dairy (approximately six weeks), Three S Trucking (approximately one week), Happy Landings Café (approximately one month), and various

one day jobs with other employers.

15. Claimant's condition gradually improved, however on May 18, 2005, Dr. Retmier examined Claimant and imposed continued work restrictions of no lifting over 20 pounds, no climbing ladders, no more than four hours per day of standing and then four hours per day of sedentary work. The record contains no release to full duty, thus at the time of hearing Claimant was still in a period of medical recovery from his work injury and continued to be restricted in work activities.

16. Claimant's work ethic is evidenced by his regularly working from 40 to more than 50 hours weekly prior to his accident, the fact that he approached Gough asking to return to work after his tendon repair surgery (the record suggests that Claimant may have returned to work five days before receiving a medical release for sedentary work), the fact that he did not want to just "do nothing" after he returned to restricted work, and by his substantial efforts to find other work within his medical restrictions after Employer fired him.

17. At the time of hearing, Claimant continued seeking work and was very motivated to work as he needed the income. Claimant was registered with the Employment Office of the Idaho Department of Commerce & Labor, Personnel Plus, Labor Ready, and SOS Staffing and Employment Solutions. Claimant was constrained by economic necessity to attempt work beyond his restrictions, which exacerbated his lower extremity pain. Due to his inability to find suitable work, his financial situation deteriorated. Claimant was unable to afford his apartment in Rupert and lived for a time at the Port of Hope in Twin Falls, but eventually was unable to afford even the discounted rent there. For the two months immediately prior to hearing, Claimant continuously rotated his living arrangements—staying a couple of nights with friends, a couple of nights with his mother, and a couple of nights in his car. Claimant was motivated, but largely unsuccessful in

finding suitable employment of any duration from December 3, 2004, through the date of hearing.

DISCUSSION AND FURTHER FINDINGS

18. Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Furthermore:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

19. Defendants argue that Lacey 2004 v. Employer, et al., 2004 W.L. 812735 (April 5, 2004), and Rafael 2004 v. Employer et al., 2004 W.L. 1136613 (April 16, 2004), confirm that neglect to perform light duty work justifies termination of temporary disability benefits—a result which they urge in the present case. In Lacey, claimant was released to light duty work not involving her injured right upper extremity. Employer offered her a job within her restrictions but claimant

refused to work. Her employment then ended. In Rafael, employer offered claimant light duty work, however claimant received a written warning which he felt was undeserved. Claimant left the plant, never returning to the light duty work offered. In each case, the Commission found claimant had refused the light duty work offered and, pursuant to Idaho Code § 72-403, was not entitled to further temporary disability benefits.

20. In the present case, Claimant did not refuse to perform offered work, as did claimants in Lacey and Rafael, rather, Claimant herein left work two hours earlier than authorized, for which Employer fired him. The inquiry is whether this justifies Defendants' denial of temporary disability benefits. Several other prior Commission decisions dealing with denial of temporary disability benefits upon an employer's termination of claimant's employment are more instructive.

21. In Madeleine 2003 v. Employer et, al., 2003 IIC 0296 (May 6, 2003), defendants alleged employer made a reasonable offer of suitable employment which would have continued had claimant not been discharged for attitude issues, thus "relieving" defendants from paying time loss benefits. The Commission noted: "'Relieving' a defendant from its statutory obligation to pay time loss benefits to an injured worker during her period of recovery is not a matter to be taken lightly and the standard set forth in Malueg, supra, is necessarily stringent." Madeleine, 2003 IIC at 0301. The Commission found that defendants ordered claimant to do work that aggravated her work injury, and that employer's reasonable offer of employment ended when it discharged claimant without a more concrete and substantial basis.

22. Similarly, in Claimant [Chaney] v. Employer and Argonaut Insurance Company, IC 01-024283, 2002 IIC 0710 (December 4, 2002), defendants denied claimant temporary disability benefits arguing his termination had nothing to do with his injury and they complied with Malueg

by offering him appropriate light duty work. However, scrutiny of the light duty work offered revealed it was inconsistent with claimant's physician-assigned restrictions. When claimant complained of increasing symptoms, employer simply fired him. The Commission found defendants did not offer suitable light duty work as required by Malueg.

23. Finally, in Smith v. Champion Building Products, 1994 IIC 1511 (December 14, 1994), claimant performed light duty work for several months after a work injury until his employment was terminated for missing work without calling in. The Commission first applied the requirements of Malueg to evaluate the suitability of the work offered before considering claimant's performance of that work:

> [T]he light duty work claimant performed at Champion was suitable work at the time it was performed. The Referee further finds that employment was reasonably likely to continue and that defendants had a valid basis for firing claimant. Claimant did not appear for work on a Saturday during hunting season, October 20, 1990. He claims he had a note from his doctor to be excused on Friday and Saturday. However, no note was produced to that effect. Claimant was aware of the company policy that he was to call in if he could not report to work and did not do so. Don Smith, Champion's division manager, testified that they called claimant's home all day and claimant's answering machine said he was at the store and would be right back.

1994 IIC at 1521.

24. Consistent with Madeleine, Chaney, and Smith, Employer's offer of light duty work in the present case must first be evaluated according to the requirements of Malueg, then Claimant's performance will be scrutinized.

25. In the present case, Dr. Wright restricted Claimant to: "strictly NWB [non-weight bearing] … sedentary work only." Exhibit E (chart note of November 15, 2004). In his chart note of December 15, 2004, Dr. Retmier affirmed Claimant's "work restrictions for sedentary work only with no lifting whatsoever." Exhibit E. Claimant described the work he was released to perform as

"sit-down work" which captures well one of the major differences between sedentary and light work restrictions. The medical evidence thus clearly establishes that Claimant was in a period of recovery from his industrial accident when Defendants terminated his employment on December 3, 2004, and also denied him temporary disability benefits. Therefore the burden rests upon Defendants to prove they complied with Malueg by extending a reasonable and legitimate offer of suitable employment to Claimant or by proving that suitable employment was available in the general labor market which Claimant had a reasonable opportunity of securing.

26. While it is clear Claimant was released to sedentary—not light duty—work prior to his termination on December 3, 2004, it is not clear that Employer distinguished between activities suitable for sedentary, as differentiated from light duty, work. Gough articulated his understanding of Claimant's restrictions when he returned after the work accident: "Light duty. He couldn't lift. He couldn't perform his tasks. So, I was under the impression that no lifting, you know, heavy objects and not walking around being on his feet all day." Transcript p. 57, ls. 12-15 (emphasis supplied). It appears that Gough did not fully understand Claimant's sedentary restrictions as imposed by Dr. Wright. Not surprisingly, Claimant suffered exacerbation of his leg pain when attempting to perform the light duty work Employer offered. As cited previously, Claimant testified that some of his assigned duties, including shop cleaning, required too much standing and walking. This was one factor that, together with the limited amount of light duty work, prompted Claimant to propose the "on call" arrangement to which Gough agreed.

27. Based upon Gough's mistaken understanding of Claimant's work restrictions, Gough testified that there was plenty of "light duty work" to keep Claimant busy the entire afternoon of December 3, 2004. Claimant testified there was not, and there had not been sufficient suitable work

to keep him busy for over a week. Claimant's account is again supported by the "on call" arrangement that Claimant and Gough reached and which both affirmed at hearing. Gough acknowledged that Coon reported Claimant had told her there was no more work for him to do prior to leaving on December 3, 2004.

28. On the afternoon of December 3, 2004, Gough assigned Claimant to inventory the panel screws, clean the supervisor's office, and a few other things. Gough acknowledged that it would only take Claimant about 30 minutes to clean the supervisor's office. He testified it would take a great deal of time to scrape glue from and clean the trial machine bead extruder. However, Claimant testified that the bead extruder was not running at that time, that the extruder had been used only for a couple of test runs, and that only the front of the extruder needed cleaning. Claimant further testified that because of a wall, the back of the extruder was not accessible from a chair and thus could not be cleaned by someone sitting in a chair. This further evidences Gough's inaccurate understanding of Claimant's restrictions to sedentary rather than light duty work.

29. Gough also testified that on the afternoon of December 3, 2004, Claimant could have made five and one-half inch blocks that Employer used regularly to protect panels during delivery. However, Claimant never made such blocks after his work injury because the height of the table where the blocks were fabricated made it unsafe to use a power tool to assemble the blocks while sitting down. Furthermore, there is no testimony in the record that Employer ever assigned Claimant to make blocks on December 3, 2004, or any time after Claimant's industrial accident. It appears that making blocks was not a work activity assigned to Claimant on December 3, nor an activity that Claimant could perform for any appreciable length of time given his sedentary work restrictions.

30. Gough's testimony that sufficient light duty work was available because Claimant could have made blocks is further undermined by Gough's admission that he agreed to call Claimant when there was sufficient light duty work available to justify Claimant's travel from his residence in the Burley area to the Employer's shop in Jerome. Gough not only acknowledged but also implemented this arrangement by calling Claimant the evening of December 2, after Claimant had not reported for work from November 30 through December 2, and requesting that he come into the shop the next morning because Employer had a load of panels for Claimant to deliver. The Referee finds that making blocks was not offered or assigned to Claimant on December 3, 2004, and would likely not have been suitable work for him even had it been offered.

31. Claimant completed the suitable work assigned him on December 3, 2004 and then left the shop. The record does not establish that Employer offered sufficient work within Claimant's sedentary work restrictions to keep him busy from 2:00 until 4:00 p.m. on December 3, 2004, as required by Malueg. Claimant's leaving two hours early after finishing the work available given his medical restrictions, and ensuring that his time card accurately reflected his departure time, does not constitute refusal to work, pursuant to Idaho Code § 72-403, nor is it adequate grounds to terminate Claimant's statutory entitlement to temporary disability benefits.

32. Since Claimant was still in a period of recovery, and Defendants have not met their burden imposed by Malueg v. Pierson Enterprises, the Referee concludes Claimant is entitled to temporary total disability benefits from the date of his termination on December 3, 2004, through at least the date of hearing. Defendants are entitled to reduce their obligation by the amount Claimant actually earned from his attempts at other employment between December 3, 2004, and the date of hearing.

CONCLUSIONS OF LAW

1. Claimant is entitled to temporary total or temporary partial disability benefits from December 3, 2004, until Claimant is released to full duty work, or Employer makes a reasonable offer of employment that Claimant is capable of performing under his work release and which employment is likely to continue through his period of recovery, or Claimant finds suitable comparable employment.

2. Defendants are entitled to reduce their obligation by the amount Claimant actually earned from his attempts at other employment between December 3, 2004, and the date of hearing.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this _10th____day of November, 2005.

INDUSTRIAL COMMISSION

/s/_____
Alan Reed Taylor, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __10th_ day of _November_____, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

JAMES C ARNOLD
PO BOX 1645
IDAHO FALLS ID 83403-1645

E SCOTT HARMON
PO BOX 6358
BOISE ID 83707-6358

kr /s/_____